DISTRICT OF COLUMBIA
DOH Office of Adjudication and Hearings

DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH Petitioner, v. TOTS NURSERY SCHOOL and CARLISE DAVENPORT, Respondents	Case No.: C-00-80001

FINAL ORDER

I. Introduction

The Government has served on Respondents a notice of intent to revoke their license to operate a child development facility located at 1317 Shepherd Street, N.W. The Government alleged that the Respondents, over a period of nearly fourteen months, did not employ a sufficient number of teachers who satisfied the qualifications established by 29 DCMR 315.4. The notice informed Respondents of their right to a hearing to challenge the proposed revocation, and Respondents filed a timely hearing request. This administrative court has jurisdiction in this case pursuant to Reorganization Plan No. 4 of 1996, Mayor's Order No. 97-42, Mayor's Order No. 99-68 and Department of Health Organizational Order No. 99-24.

This administrative court held an evidentiary hearing on March 3, 2000. At the close of the hearing, the parties expressed interest in pursuing settlement discussions. The record was

also held open to permit the parties an opportunity to submit proposed findings of fact and conclusions of law. The Government made such a submission. Respondents did not. The administrative court has received no further communication from the parties regarding settlement, and it therefore appears that any settlement efforts have been unsuccessful. Accordingly, the administrative court issued its proposed findings of fact and conclusions of law pursuant to 29 DCMR 307.4.

By order dated October 26, 2000, the administrative court issued proposed findings of fact and conclusions of law (the "proposed decision") pursuant to 29 DCMR 307.4, and permitted the parties to file comments by November 11, 2000 (ten calendar days plus five days for service by mail). Neither Respondents nor the Government filed comments by the due date.[1] Therefore, the final decision and order of this administrative court is hereby rendered and the Government's proposed revocation and/or non-renewal of Respondents' license is affirmed.

II. Findings of Fact

Based on a review of the record evidence, including the testimony presented at the hearing and the entire record in this case, this administrative court finds by a preponderance of the evidence that:

[1] The administrative court subsequently made a small number of stylistic revisions to the proposed decision that are contained herein and which are intended to promote clarity. None of these changes are intended to alter the substantive meaning or effect of the proposed decision.

1. Respondent Tots Nursery School ("Tots"), located at 1317 Shepherd Street, N.W., is a licensed child development facility.

2. Respondent Carlise Davenport is and was at all relevant times the director of Tots.

3. It is undisputed, and the administrative court finds, that an inspector from the Department of Health visited Tots on or about November 16, 1998, January 5, 1999, January 25, 1999, April 1, 1999 and January 12, 2000 (the "inspection days").

4. It is undisputed, and the administrative court finds, that on and throughout each inspection day the facility cared for at least four separate groups of children, divided by age.

5. It is undisputed, and the administrative court finds, that on each inspection day there were no more than three persons present at the facility who possessed the qualifications required of a child development facility teacher as specified in 29 DCMR 315.4. Those three persons were Respondent Carlise Davenport, Clifford Davenport, and Deborah Gutrich. There were at least three other workers on site during each of the inspections, but they were qualified, at most, to be assistant teachers pursuant to 29 DCMR 315.5.

6. Because the facility employed three qualified teachers at most, but cared for at least four separate groups of children on each of the inspection dates noted in paragraph 3, including the hours between 8:30 AM and 4:30 PM, a qualified

teacher did not supervise at least one group on each inspection date between the hours of 8:30 AM and 4:30 PM.

7. It is undisputed, and the administrative court finds, that early in 1999, Respondent Carlise Davenport suffered from a severe and unexpected medical condition that required surgery, followed by a hospital stay and convalescence period. As a result, she was unavailable to work at the child development facility for a substantial period of time that included the January 25, 1999 and April 1, 1999 inspection days. Ms. Davenport was available to work on the other three inspection days, however.

III. Conclusions of Law

Pursuant to 29 DCMR 306.1, the Department of Health may revoke or refuse to renew a license to operate a child development facility if the licensee has violated any of the provisions of Title 29, Chapter 3 of the District of Columbia Municipal Regulations.[2] The Government

[2] Although § 306.1 states that the Government "shall be required" to revoke or refuse to renew a license if it finds that a licensee has failed to comply with any regulation, other rules permit the Government to pursue less drastic alternatives, making it appear that the power to revoke a license is discretionary. *See* 29 DCMR 306.3 (permitting the Government to offer a licensee an opportunity to correct a violation); 29 DCMR 310.4 (permitting the Government to seek civil penalties as an alternative sanction). More important, the applicable statute, D.C. Code § 6-3630, postdates promulgation of 29 DCMR 306.1, and substitutes the word "may" for "shall" with regard to the Mayor's authority, thereby making clear that the revocation power is now discretionary rather than arguably mandatory. *See Kremer v. Chemical Construction. Corp*., 456 U.S. 461, 468 (1982) (The legislature is presumed to know existing law and an implied repeal will be found when a subsequent enactment is in irreconcilable conflict with a previous law or rule)**;** *see also AFL-CIO v. Brock*, 835 F.2d 912, 916-17 (D.C. Cir.1987). Neither party has addressed what, if any, authority has been given to the presiding administrative law judge under the newly enacted D.C. Code § 6-3636(b) with regard to review of the agency's selection of the

contends that Respondents violated the provisions concerning the qualifications of teachers and the required supervision of groups on each of the inspection days.

Section 315.4 of 29 DCMR establishes the qualifications for teachers in child development facilities. That section provides:

> "Teachers at child development facilities shall be qualified by meeting the requirements of one (1) of the following:
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> > (a) A bachelor's degree in early childhood education or a related field with a minimum of fifteen (15) hours in early childhood education courses;
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> > (b) Two (2) or more years of college, including at least fifteen (15) hours of early childhood education courses; and one (1) year of experience in a child development facility;
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> > (c) A high school diploma or its equivalent and three (3) years of experience as a teacher or assistant teacher in a child development center, plus, on or before July 1, 1977, nine (9) college credit hours in early childhood education from an accredited college or university; or
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> > (d) Experience as a teacher or assistant teacher in a licensed child development center; Provided, that he or she has been awarded a child development associate credential."

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revocation sanction in a contested case. Because D.C. Code § 6-3630 gives clear and broad discretion to the agency, any such review would appear to require substantial deference to any rational choice made by the agency in its considered discretion to revoke a license where revocation is a legally permissible option. *See, e.g., Ecee, Inc. v. Federal Energy Regulatory Commission*, 645 F.2d 339, 354 (5th Cir 1981); *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 644 (10th Cir. 1990). That standard was satisfied here where Respondents' persistent, uncorrected, and substantial regulatory violations created a significant risk to the health, safety, and welfare of young children.

According to 29 DCMR 316.2, each group of children must have a dedicated teacher and an assistant teacher, although an assistant teacher may substitute for a teacher during non-peak hours, i.e., before 8:30 A.M. and after 4:30 P.M. The facts found in this case demonstrate that Respondents failed to comply with § 316.2 on each of the inspection days. On those days, Respondents employed, at most, only three persons who met the qualifications for teachers, while they cared for at least four groups of children. These facts were confirmed by Respondents' sworn testimony. It logically and mathematically follows that a qualified teacher did not supervise at least one group on each of the inspection days, during the period of the day when an assistant teacher was not eligible to substitute, i.e., after 8:30 AM and before 4:30 PM.

Respondents argue that a medical emergency caused Ms. Davenport's absence from the facility on January 25 and April 1, 1999, and that any violation of the regulations on those dates should be excused. That argument is unpersuasive for at least two reasons. First, even if Ms. Davenport were present on those days, there would have only been three available teachers for four separate groups, in violation of § 316.2. Second, Ms. Davenport's illness would not excuse the April 1, 1999 violation. Section 316.2 is a safety regulation, and child development facilities must act promptly to obtain substitutes when a teacher unexpectedly becomes unavailable. On April 1, Ms. Davenport had been absent for more than two months and the facility had more than adequate time to find a substitute.[3] Moreover, Ms. Davenport's illness has no bearing on the

[3] Because § 316.2 lacks any expressed requirement of intent or other culpability level, it could well be argued that it establishes a strict liability standard in this important area of public health and welfare. If so, there could be no acceptable excuse for a violation. *See generally, Iran Air v. Kugelman*, 996 F.2d 1253, 1258-59 (D.C. Cir. 1993). The administrative court need not decide that issue here, since it would not affect the result in this case. As noted in the text, the facility violated § 316.2 on each of the inspection days. Even if Ms. Davenport's absence on January 25

violations that occurred on the other three inspection days, and those violations by themselves are sufficient support for the revocation of Respondents' license.

The Government has established that Respondents violated 29 DCMR 316.2 on five separate occasions by not having a sufficient number of teachers who met the qualifications established by 29 DCMR 315.4. Accordingly, it has met its burden pursuant to 29 DCMR 306.1 of proving that Respondents failed to comply with at least one regulation contained in Chapter 3 of 29 DCMR, and its decision to revoke Respondents' license must be affirmed.

IV. Order

Based upon the hearing held in this case and the foregoing findings of fact and conclusions of law, it is, this _____ day of _____, 2000:

ORDERED, that the Government's proposed revocation of Respondents' license to operate a child development facility is **AFFIRMED** and the Government may revoke the Respondents' license in any manner consistent with applicable law; and it is further

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and April 1 was excusable, there were at least three other unexcused violations that form a basis to affirm the agency's revocation decision.

ORDERED that, pursuant to D.C. Code §§ 6-3635 and 1-1510, judicial review of this order may be obtained by filing a petition for review with the District of Columbia Court of Appeals. Pursuant to D.C. App. R. 15(a), any such petition must be filed within thirty-five (35) days of the service date of this order stated below.

FILED 11/14/00

Paul Klein
Chief Administrative Law Judge